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No. 84-1728

In the Supreme Court of the United States

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not establish any substantive limitations on a federal agency's right, in accordance with applicable laws, to make determinations with respect to contracting-out, but instead only restates an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3; the Authority's denial of the Equal Employment Opportunity Commission's request for reconsideration of that decision is reported at 11 F.L.R.A. 720.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1984 and a petition for rehearing was denied on December 3, 1984. On February 26, 1985, the Chief

Justice extended the time within which to file a petition for a writ of certiorari to May 2, 1985 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the

personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121(a)-(c) provides:

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided

in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

STATEMENT

1. The Federal Service Labor-Management Relations Statute (the Statute), as amended, 5 U.S.C. 7101-7135 (1982) and Pub. L. No. 98-224, §§3-4, 98 Stat. 47, 47-48 (1984), governs labor-management relations in the federal service. To administer the Statute, Congress created the Federal Labor Relations Authority ("FLRA" or "the Authority"). 5 U.S.C. 7104-7105. The Authority's responsibilities include resolving issues relating to the duty to bargain. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 3.

The Statute establishes a system of collective bargaining that requires federal agencies and employee unions to bargain in good faith "with respect to * * * conditions of employment." 5 U.S.C. 7103(a)(12). The term "conditions of employment" is defined in the Statute as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Statute excludes certain management prerogatives from the scope of negotiations. See 5 U.S.C. 7106. As pertinent to this case, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and a union from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106.

At the request of either party, the product of collective bargaining negotiations must be reduced to a collective bargaining agreement. 5 U.S.C. 7114(b). By the terms of the Statute, such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1).

Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance'";[1] Section 7121 lists only five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[2]

2. During the course of contract negotiations with the Equal Employment Opportunity Commission, the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

(Pet. App. 40a). EEOC declared the proposal nonnegotiable and refused to bargain over it *(ibid.)*. To resolve the dispute, the union filed a petition for review with the Authority pursuant to 5 U.S.C. 7117(c) *(ibid.)*.

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[1] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) *(Legis. Hist.)*.

[2] The five subject matters excluded are:

> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
>
> (2) retirement, life insurance, or health insurance;
>
> (3) a suspension or removal under section 7532 of this title;
>
> (4) any examination, certification, or appointment; or
>
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). Parties can, in negotiation, agree to exclude more. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 applies to Executive agencies and provides direction for agency decisions whether to contract out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979).

Upon consideration of the entire record, the Authority issued a decision finding the proposal negotiable (Pet. App. 40a-48a).[4] The Authority concluded that the proposal did not impair EEOC's statutory right to make contracting-out determinations because it only recognized existing external limitations on EEOC's right and did not establish any substantive limitations on management discretion (Pet. App. 41a).

The Authority further concluded that the proposal was not rendered nonnegotiable by the terms of the Circular. The Authority rejected the assumption underlying this argument that contracting-out disputes are not grievable in the absence of the proposed contract language (Pet. App. 42a). The Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining *(ibid.)*. Accordingly, the Authority stated that even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a; emphasis in decision).

3 In an opinion by Judge Tamm, the court of appeals (Senior Judge MacKinnon, dissenting) upheld the Authority's decision and enforced the Authority's order (Pet. App. 1a-37a). The court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 8-9, stated at the outset that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (Pet. App. 7a). See also Pet. App. 7a n.11.

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[4] When the Authority finds a proposal negotiable, the Authority holds only that the agency must bargain over the proposal in good faith and upon the union's request. The Authority neither considers the merits of the proposal nor orders the agency to agree to it. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations and that any bargaining proposal regarding contracting-out would restrict that authority. The court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (Pet. App. 8a). Since the union's proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not of itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (Pet. App. 9a).

Second, the court rejected EEOC's argument that the adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure. The court noted that this EEOC argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal. Such an assumption, the court found, was "contrary to the text" of the Statute which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" and which, in 5 U.S.C. 7121(c), expressly excludes the subject matter of only five types of grievances from the coverage of the negotiated grievance procedure (Pet. App. 12a).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable (Pet. App. 14a-15a). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924.

Finally, the court rejected EEOC's argument that the language of the Circular renders the proposal nonnegotiable (Pet. App. 16a). First, the court noted that the proposal is not inconsistent with the Circular in that the Circular only states that its provisions "shall not be construed to create" any new right of appeal, whereas the court had just found that the right to file grievances regarding contracting-out decisions is created by the Statute. Second and, "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (Pet. App. 16a). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place limitations in the Statute not placed there by Congress *(ibid.)*.

Senior Judge MacKinnon dissented (Pet. App. 18a-37a). He concluded (Pet. App. 19a) that violations of the Circular and other regulations regarding substantive contracting-out decisions are not statutorily grievable under a negotiated grievance procedure.

The court of appeals denied EEOC's petition for rehearing; the court of appeals also denied EEOC's suggestion for rehearing en banc (Pet. App. 38a-39a).[6]

ARGUMENT

The decision of the court of appeals is plainly correct. The court properly construed two provisions of the Statute: 5 U.S.C. 7106(a)(2)(B), which preserves to management the authority to make determinations with respect to contracting-out in accordance with applicable laws, and 5 U.S.C. 7121, which authorizes a broad scope negotiated grievance procedure that mandatorily excludes only five

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[6] Senior Judge MacKinnon would have granted the petition for rehearing; Judges Bork, Scalia, and Starr would have granted the suggestion for rehearing en banc (Pet. App. 38a-39a).

subject matters, none of which involve contracting-out. Moreover, the court's decision does not conflict with any decision of this Court or any court of appeals.[7] Therefore, the decision does not warrant review by this Court.

1. Petitioner acknowledges (Pet. 9 n.4) that it is required to make contracting-out determinations in accordance with the Circular and any other applicable laws and regulations. Nonetheless, petitioner contends (Pet. 13) that language which would embody this requirement in a collective bargaining agreement is nonnegotiable because it would affect the authority of agency management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). However, petitioner is incorrect because, as the court of appeals correctly found, the proposal "does not of itself establish any substantive criteria guiding management's contracting-out determinations," and thus "does not affect management's reserved authority, within the meaning of the statutory language, to make contracting-out decisions" (Pet. App. 9a).

As the court of appeals properly concluded, "[b]ecause the [Statute] does not grant to management unqualified authority to contract-out, union proposals touching upon that authority are not automatically rendered nonnegotiable. Rather, management may refuse to bargain over only those proposals that would expand upon the restrictions contained

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[7] Petitioner's suggestion (Pet. 23 n.20) that a conflict among the circuits could never arise on this issue is in error. Any Authority order requiring an employing agency to bargain over a similar union proposal would be subject to judicial review "in the circuit in which the [agency] resides or transacts business." 5 U.S.C. 7123(a). In this regard, a case involving the negotiability of a bargaining proposal that would require correction of in-house estimates that are not prepared in accordance with existing contracting-out directives is pending in the Ninth Circuit. *Defense Language Institute* v. *FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985).

in the [Statute]" (Pet. App. 8a-9a).[8] The proposed contract language found negotiable in this case would not expand upon those restrictions; rather, it reserves to management the full range of discretion available to it under law, which is precisely the same range of discretion reserved to management under Section 7106(a)(2)(B).[9]

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[8] Petitioner's characterization of the Statute, as "render[ing] nonnegotiable any bargaining proposal that would affect substantive agency decisions involving contracting out for goods and services" (Pet. 13), is incomplete. What the Statute reserves to management as nonnegotiable is the authority, subject to the obligation to bargain created by 5 U.S.C. 7106(b)(2) and (b)(3), to make contracting-out determinations which are *in accordance with applicable laws*. Petitioner's attempt (Pet. 16) to attribute a meaning to "in accordance with applicable laws" different from that found by the court (Pet. App. 8a) is not only articulated for the first time in this case in this petition, but is without support in the Statute or its legislative history.

[9] By contrast, the Authority has found nonnegotiable proposed language that would not reserve to management the same range of discretion allowed to it under law. *E.g., National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom., NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982) (proposal which would have locked management into observing specific terms derived from the Circular without allowing for the possibility that the Circular could be revised or rescinded); *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. 669 (1981) (proposal which would have required that contracting-out determinations be "fair, equitable, and in accordance with established policy" would have constricted management's discretion beyond the externally imposed limitation to comply with applicable laws and regulations). Furthermore, consistent with this principle and contrary to petitioner's argument (Pet. 18 n.14), the Authority, in *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (1985) (slip op. 6), found a proposal nonnegotiable because the proposal "requires that contracting-out decisions be made in accordance with provisions of the parties' collective bargaining agreement and the Union is seeking to include provisions in the parties' agreement which would establish substantive limitations on management's authority."

Thus, contrary to petitioner's argument (Pet. 14-15), it is precisely the exercise of management's judgment with respect to the discretionary aspects of the contracting-out determination that is preserved as nonnegotiable by the Statute. As the Authority and the court of appeals properly found, the proposal does not infringe on that discretion.[10] Irrespective of any contract language, management contracting-out decisions must be made within the bounds of law and regulation. There is simply nothing about the proposal which interferes with a management contracting-out decision made within those bounds.[11]

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[10] Moreover, an arbitrator, in resolving a grievance under the provision, may not apply the provision in a manner inconsistent with the Circular's reservation of discretion to the agency. Thus, to the extent that the Circular reserves discretion to the agency, an arbitrator's award may not interfere with that discretion. See, *e.g., U.S. Department of Justice, Federal Prison System and AFGE, Council of Prison Locals, Local 1741,* 15 F.L.R.A. No. 178 (1984); *AFGE, Local 1917 and United States Immigration and Naturalization Service,* 15 F.L.R.A. No. 147 (1984) and cases cited therein; *PATCO and FAA,* 5 F.L.R.A. 763 (1981). See also *AFGE, Local 1968* v. *FLRA,* 691 F.2d 565, 573-574 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

As the cited cases demonstrate, the Authority is responsible under the Statute for resolving exceptions to arbitrators' awards, and for taking appropriate corrective action if upon review the Authority finds that the award is deficient because, *inter alia,* the award is contrary to any law, rule, or regulation. 5 U.S.C. 7122(a) and 5 U.S.C. 7105(a)(2)(H). With respect to the arbitration awards cited by petitioner (Pet. 22 n.19), in each of those cases the Authority has granted the agency's request for a stay of the award pending resolution of the exceptions by the Authority. We are lodging with the Clerk of the Court, and providing to counsel for the other parties, copies of these Authority stay orders. See 5 C.F.R. 2429.8. See also *U.S. Soldiers' and Airmen's Home, Washington, D.C.,* 15 F.L.R.A. No. 26 (1984), petition for review pending, *AFGE, Local 3090* v. *FLRA,* No. 84-1439 (D.C. Cir. argued May 2, 1985).

[11] Petitioner argues that arbitral review would interfere with government efficiency (Pet. 9-10) and Executive authority (Pet. 19). However, it would appear that the possibility of arbitral and Authority review of a contractual provision that simply restates what the OMB Circular already requires management to do would have the opposite effect by encouraging compliance with the Circular.

2. Petitioner argues (Pet. 17-18) that subjecting any aspect of management's contracting-out actions to the negotiated grievance procedure is inconsistent with the Statute's preservation of management's nonnegotiable authority to make determinations, in accordance with applicable laws, with respect to contracting-out. However, as the court of appeals correctly concluded, this argument is "contrary to the text of the [Statute]" (Pet. App. 12a) because "a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause" (Pet. App. 14a; footnote omitted).

In the Statute, Congress required that "any collective bargaining agreement shall provide procedures for the settlement of grievances." 5 U.S.C. 7121(a). As the court of appeals correctly found, and absent agreement otherwise by the parties,[12] the Statute "expansively defines the subjects covered under the statutory grievance procedure" (Pet. 12a).[13] 5 U.S.C. 7103(a)(9). See *AFGE, Locals 225, 1504,*

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[12] Pursuant to 5 U.S.C. 7121(a)(2), the parties are free to bargain over excluding any matter from the application of the negotiated grievance procedure. In this way, management, if it chooses, can bargain to exclude grievances with respect to contracting-out from the scope of the negotiated grievance procedure. See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983). Moreover, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

[13] Petitioner's argument (Pet. 17 n.13) that the Statute's definition of "grievance" does not bring within the negotiated grievance procedure a grievance by an employee adversely affected by management's decision to contract out is in error. Congress defined grievance as including any complaint concerning "any matter relating to the employment of [an] employee." 5 U.S.C. 7103(a)(9)(A) and (B). Further, and as the court of appeals correctly pointed out (Pet. App. 13a n.18), petitioner ignores this definition and proceeds to constrict improperly the one definition of grievance analyzed, *i.e.*, a claimed violation of regulations

and 3723 v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). Most important, as the court of appeals properly found, "[a]n allegation that EEOC failed to comply with the OMB Circular, or with any other law or rule governing contracting-out, plainly falls within this expansive definition" (Pet. App. 13a; footnote omitted).[14]

"affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). "Conditions of employment" means "personnel policies, practices, and matters * * * affecting working conditions." 5 U.S.C. 7103(a)(14). Petitioner's approach would confine the phrase "matters affecting working conditions" to only work hazards and work surroundings, and petitioner provides no basis for doing this. Petitioner's approach also ignores the fact that the term "conditions of employment" includes personnel policies and practices, as well as matters affecting working conditions, and as the court of appeals stated, contracting-out decisions, which may result in employee layoffs, "undoubtedly fall under the umbrella of personnel policies or practices" (Pet. App. 13a n.18).

[14] Petitioner overlooks this statutory scheme. In so doing, petitioner also ignores the fact that, in the Statute, Congress created a central and special role for negotiated grievance procedures and grievance arbitration that departed significantly from the scope and role of negotiated grievance procedures mandated by the pre-Statute labor relations program. Specifically, Congress mandated that negotiated grievance procedures be "fair and simple," provide for "expeditious processing" of grievances, and culminate in binding arbitration for unresolved grievances. 5 U.S.C. 7121(b). Under the pre-Statute labor relations program, negotiated grievance procedures were not required to be binding and were not allowed to be as broad in scope because they were required to exclude matters for which a statutory appeal procedure existed. See Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *Legis. Hist.* 1283, 1314-1319. Petitioner's reliance (Pet. 18 n.14) on the nature of the negotiated grievance procedure authorized under the pre-Statute labor relations program ignores the fact that Congress, in authorizing a broad scope for negotiated grievance procedures and in requiring that grievance arbitration be binding, significantly changed the nature of, and the role served by, the negotiated grievance procedure in federal-service labor management relations.

Moreover, these provisions of the Statute reveal the favor with which Congress viewed the negotiated grievance procedure and binding arbitration for the federal sector labor-management relations program.

Section 7121(c) limits the permissible reach of a negotiated grievance procedure by statutorily removing only five specific matters from that reach; management's contracting-out determinations is not one of the matters removed. Further, Section 7121(c) was used by Congress when it wanted to make an aspect of a nonnegotiable right also nongrievable.[15] In the instant case, despite the specific congressional awareness of, and the desire to make nonnegotiable, the right of management to make contracting-out determinations in accordance with applicable laws, Congress did not make those determinations nongrievable.[16]

See, *e.g.*, 124 Cong. Rec. 29182 (1978), *reprinted in Legis. Hist.* at 923, (remarks of Cong. Udall) ("[T]he arbitration provision I view as much of a gain for management as for labor. The Federal managers now, instead of having to go through difficult, complex appeal procedures, will be able to submit them to arbitration, and this is a gain for management."); 124 Cong. Rec. 25722 (1978), *reprinted in Legis. Hist.* at 856, (remarks of Cong. Ford) ("Binding arbitration • • • has worked well as an expeditious, credible and cost-effective means of dispute resolution."). See also *Devine* v. *White*, 697 F.2d 421, 435 (D.C. Cir. 1983) (discussing bases for arbitration's acceptance in federal sector employment).

[15] For example, the right to discipline employees is a nonnegotiable management right (5 U.S.C. 7106(a)(2)(A)). However, Section 7121(c)(3) prohibits only the grievance of an employee removal that has been taken for national security reasons. Employee discipline which has been taken for other reasons remains grievable. See 5 U.S.C. 7121(e); see also, *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669 (D.C. Cir. 1983); 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. Further, disputes over whether management has made a valid selection for a vacant position fall within the scope of the negotiated grievance procedure even though the right to make selections for employee positions is a nonnegotiable management right (5 U.S.C. 7106(a)(2)(C)). *E.g.*, *AFGE, Local 12 and U.S. Dep't of Labor*, 15 F.L.R.A. No. 113 (1984).

[16] Petitioner argues (Pet. 21 n.18) that courts have previously removed disputes from the jurisdiction of the negotiated grievance procedure. However, in each case cited by petitioner, it has been a category of employee, not a general subject matter, that has been removed; and in each case, the basis for removal stemmed from a conflict between two separate statutes. No court has removed a general subject matter

Accordingly, the court of appeals correctly concluded that "[t]he statutorily defined grievance procedure therefore encompasses a claim that a contracting-out determination was not made in accordance with law" (Pet. App. 15a) and the "adoption of the proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance procedure" (Pet. App. 15a-16a; footnote omitted).

3. Finally, petitioner argues (Pet. 19-21) that the proposal is nonnegotiable because it conflicts with the Circular's language that the Circular's provisions "shall not be used to create" any new right of appeal. However, this argument was properly rejected by the court of appeals.

As the court of appeals correctly found, the proposal is not inconsistent with the Circular because the proposal does not "create" any new right of appeal. While the Circular specifies that the terms of the Circular "shall not be construed to create[ ] any substantive or procedural" right of appeal (44 Fed. Reg. 20558 (1979)), the right to file grievances regarding contracting-out is created not by the Circular but by the broad scope negotiated grievance procedure authorized by Congress in this labor-management statute. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir. 1983). As the court of appeals and the Authority correctly held, the Statute itself, not this proposal, brings contracting-out determinations within the ambit of the negotiated grievance procedure.

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from the scope authorized by Congress for negotiated grievance procedures. Of course, Congress could have chosen to exclude matters relating to contracting-out determinations from the permissible scope of a negotiated grievance procedure. The simple fact, however, is that it did not do so. Petitioner's argument is more appropriately directed to Congress. See, *e.g.*, *AFGE, Council of Prison Locals, Local 1286* v. *U.S. Dep't of Justice*, 738 F.2d 742, 747 (6th Cir. 1984) *(quoting Griffith* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)); *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1502 n.9 (D.C. Cir. 1984).

Second and, "more important[ly]," even if there were an inconsistency between the Circular and the Statute, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place 'limitations in the statute not placed there by Congress'" (Pet. App. 16a; citation omitted). Thus, the court of appeals correctly rejected petitioner's argument that the Circular should override the operation of rights flowing directly from the Statute.[17] There is simply no indication in the Statute or its legislative history that Congress intended to permit the specific rights created by the terms of the Statute to be superseded by administrative regulation.[18]

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[17] On the one hand, petitioner seeks to have this regulation override the terms of the Statute. On the other hand, and for the first time in this case, petitioner suggests (Pet. 18-19) that this regulation does not qualify as an "applicable law" within the meaning of Section 7106 or as a "law, rule, or regulation" within the meaning of Section 7103(a)(9).

[18] In arguing that the Circular should override the Statute's specific authorization of a broad scope negotiated grievance procedure, petitioner misconstrues Section 7117(a)(1) of the Statute. Section 7117(a)(1) authorizes "the issuance of governmentwide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible" under the Statute. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 155 (1978), *reprinted in Legis. Hist.* at 823. This section prevents parties from acquiring, through their negotiations, rights and obligations that are inconsistent with provisions of a governmentwide rule or regulation. Contrary to petitioner's argument, Section 7117(a)(1) does not apply to proposals which simply incorporate into the contract rights and obligations existing independently by operation of law. Were it otherwise, government-wide regulations, under the guise of Section 7117(a)(1), would be able to supersede rights specifically conferred by Congress in other provisions of the Statute, a result which neither the Statute nor its legislative history supports.

CONCLUSION

The petition for a writ of certiorari should be denied.[19]
Respectfully submitted.

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[19] "I authorize the filing of this brief in opposition to the petition for a writ of certiorari. Rex E. Lee, Solicitor General."

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